BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MELANIE SCHLEININGER Claimant VS. **MENORAH MEDICAL CENTER** Respondent AND **ACE AMERICAN INSURANCE CO.** Insurance Carrier	)	Docket No. 1,059,212

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the May 31, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Steffanie L. Stracke, of Kansas City, Missouri, appeared for claimant. Matthew J. Stretz, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's need for a right knee replacement was due to her accidental injury of April 13, 2011, that arose out of and in the course of her employment with respondent. Respondent was ordered to provide claimant with the right knee arthroplasty.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 30, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether claimant's accidental injury and need for treatment arose out of and in the course of her employment.

Claimant argues that her accidental injury at work aggravated her preexisting condition and caused her need for a right knee replacement now rather than sometime in the future.

The issue for the Board's review is: Did claimant's accidental injury and need for treatment arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant has worked for respondent for almost 34 years. She is a registered nurse and works in the newborn nursery and neonatal intensive care nursery. Claimant testified that before her work-related accident in April 2011, she had been diagnosed with lupus and with osteoarthritis affecting her fingers, wrists, knees, hips, neck and lower back. She had been taking Tramadol for arthritic pain prescribed for her by her rheumatologist, Dr. Perri Ginder.

On April 13, 2011, claimant was working in the newborn nursery. She was taking a chart to the fax machine when she slipped in a puddle of water and fell directly on her right knee just above her kneecap. She immediately felt pain in her right knee. The left side felt as if something tore, but she also had pain on the right side of the knee. Her right knee immediately started to swell and turned black and blue. She continued to work that day. She was sent to OHS the next day and was then put on crutches. She was treated for two weeks at OHS, after which she was sent for an MRI. Claimant said the MRI showed a medial meniscus tear and a possible lateral meniscus tear, along with a bone spur that was underneath the kneecap.

After the MRI, claimant was referred to Dr. Gerald McNamara. He performed arthroscopic surgery on her right knee on May 10, 2011, to try to repair the tears. Claimant said Dr. McNamara trimmed the tear that was on the lateral side on the right but was unable to repair the tear that was on the left. Claimant was sent to physical therapy. She was still on crutches on July 14, 2011, at which time Dr. McNamara noted that she was experiencing a grinding sensation in her right knee and that her knee was giving out without warning. She was still having swelling in her right knee. Claimant said she had not been experiencing grinding in her right knee before her fall on April 13, 2011. She had not used crutches before her accident except when her right knee was "scoped" in 2003.[1]

Claimant last saw Dr. McNamara on August 11, 2011, at which time they discussed a total knee replacement. Dr. McNamara's medical note of August 11, 2011, indicated:

> Patient is still using crutches and doing poorly. Findings are consistent with meniscus tears plus arthritis. Concerns are the causation of her pain which we feel

[1] P.H. Trans. at 11

> is due to her injury at work. She does have preexisting degenerative joint disease, but was not having symptoms prior to this injury and not requiring assistance for ambulation. At this point I feel she has reached an endpoint which I feel could be improved upon by total knee replacement for ambulation without crutches and pain management.[2]

After Dr. McNamara recommended knee replacement surgery, respondent sent claimant to Dr. Samuelson for a second opinion. Claimant saw Dr. Samuelson on December 7, 2011. He agreed that claimant would benefit from a total knee replacement but stated:

> I do not feel that the need for replacement is due to the injury she sustained on April 13, 2011. She has had these arthritic changes for a long period of time and the need for knee replacements would have been present regardless of the incident that occurred on April 13, 2011. Due to the extensive arthritis present and the arthritis that has been documented previously, a knee replacement should be the responsibility of her personal health care provider.[3]

After seeing Dr. Samuelson, claimant was sent by her attorney to see Dr. Danny Gurba. Dr. Gurba performed an examination of claimant on March 19, 2012, and he agreed that claimant's only reasonable treatment option was a knee replacement. He opined:

> The principal reason for this patient's need for total knee replacement is her severe pre-existing osteoarthritis prior to her work injury. Despite this, she describes functioning far better with the arthritic knee prior to the work injury then [*sic*] she has following that work injury. I believe a work injury of April 2011 has certainly aggravated her symptoms and precipitated the need for total knee replacement in this otherwise arthritic knee.[4]

Claimant acknowledged she had a significant history with regard to the number of times she had been seen by physicians for both her knees. As far back as 1998, she had seen a physician for right knee pain with crepitus. Claimant testified that before her work-related injury of April 2011, she had arthritis in her right knee. However, she said she had not had a discussion with a physician about planning or scheduling a right knee replacement before her accident. She acknowledged that she had discussions with Dr. Ginder and Dr. McNamara about the eventuality that her knees were going to have to be replaced some time in the future. However, she was able to function at work and was

---

[2] P.H. Trans., Cl. Ex. 2 at 2.

[3] P.T. Trans., Resp. Ex. A at 3.

[4] P.T. Trans., Cl. Ex. 1 at 3.

working full time before the April 2011 accident. Since the April 2011 accident, she has continued to work because respondent has allowed her to use crutches while working.

Claimant testified she had a previous workers compensation injury while working for respondent in 2003. At that time, she tripped going into an elevator that had stopped three or four inches too high. She was knocked unconscious and also tore the meniscus in her right knee. She had arthroscopic surgery to repair the meniscus tear in her right knee on April 4, 2003, after which she was on crutches for a period of time. She was last treated for that injury on November 6, 2003.

Claimant testified that she had previously had treatment for problems with her right knee. In 2007, she had a series of three injections for a flare-up of right knee pain. She had a one-time injection in her right knee in 2010. She did not miss any time for work for any of those injections. Claimant does not deny that she had issues with ambulation when having an acute flare-up or after working a series of 12-hour shifts. She did not deny that she had pain in both her knees before her April 2011 accident. In a medical record of December 8, 2010, four months before claimant's accident, Dr. Ginder stated: "We discussed timing of knee replacement surgeries, the desirability of being able to go off nonsteroidals and whether knee replacements might allow that to happen for her."[5]

During the period after the treatment from her 2003 injury until her 2011 injury, claimant considered her left knee to be her "bad knee."[6] She testified there was no plan to replace her left knee, and Dr. McNamara said he would prefer she wait until after she turned 60 years old before replacing her left knee. Claimant said currently her right knee is her "worst knee."[7]

Claimant said when her lupus flares up, she has acute pain in all her joints, not just her knees. She said on occasion she had to use a cane when having a lupus flare-up because frequently she would have weakness in the muscles of her leg as well as joint pain. She would use a cane to get into work from the parking lot but would not use the cane while working. She always used the cane with her right hand because her left knee gave her the most problems.

Claimant testified that she now has a grinding, bone-against-bone pain on the inside of her right knee that she did not have before the April 2011 fall. She has acute pain in the joint. Her right knee still swells every day at work and at home if she is active. She has a tingling area on the outside of the right leg. She continues to use crutches to decrease the weight bearing on the right knee because the knee will give out and buckle without

---

[5] P.H. Trans., Resp. Ex. B at 2.

[6] P.H. Trans. at 21.

[7] *Id.* at 23.

warning. She is unable to work now unless she uses crutches. She has to sit more frequently at work since her fall in April 2011. She does her own grocery shopping, but she is unable to carry the groceries up the stairs into her house so her brothers, who live with her, carry her groceries. She cannot negotiate the stairs down to her laundry room so her brothers do her laundry. They also do the yard work.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

---

[8] K.S.A. 2010 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[10] *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[11] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[12] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[13]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[15]

ANALYSIS

The ALJ awarded claimant medical treatment benefits consisting of a right knee arthroplasty. The ALJ reasoned:

> The claimant's injury occurred prior to May 15, 2011 and the workers compensation act in effect prior to that date recognized as compensable injuries aggravations of pre-existing conditions. That is clearly the case here. The claimant had severe arthritis due to personal medical conditions and was looking at knee replacements someday. The April 13, 2011 work accident then worsened the claimant's symptoms enough that knee replacement on the right could no longer be put off. The question is whether the right knee replacement amounts to treatment of the compensable aggravation or is exclusively treatment of the non-compensable pre-existing condition. It is a judgment call based on the facts of the particular case.
>
> Here, knee replacement on the right was going to occur someday, but the claimant's condition did not warrant the procedure until after the work injury. The work accident caused a definite change for the worse in the claimant's right knee function and moved the knee replacement from up to five years in the future to right now. The difference in the claimant's right knee condition and treatment outlook from before and after the work accident was great enough to conclude the

---

[11] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[12] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[13] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[14] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[15] K.S.A. 2011 Supp. 44-555c(k).

> arthroplasty is treatment for the effects of the April 13, 2011 injury and not just treatment of the pre-existing arthritis. The respondent and insurance carrier shall provide the claimant the right knee arthroplasty as directed by Dr. McNamara.[16]

Having considered the entire record compiled to date, this Board Member agrees with and adopts the findings and conclusions of the ALJ. In particular, it is noted that of the three physicians who gave causation opinions on claimant's need for a right knee replacement, Dr. McNamara was in the unique position of having treated claimant over a period of years, including having performed the May 2011 arthroscopic surgery. As such, the opinion of Dr. McNamara is the most persuasive.

CONCLUSION

Claimant sustained personal injury by accident arising out of and in the course of her employment with respondent on April 13, 2011. As a direct result of that accident, claimant suffered injury to and an aggravation of her preexisting right knee condition which accelerated her need for total right knee replacement surgery.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated May 31, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Steffanie L. Stracke, Attorney for Claimant
sstracke@etkclaw.com

Matthew J. Stretz, Attorney for Respondent and its Insurance Carrier
mstretz@fsqlaw.com
jfunk@fsqlaw.com

Kenneth J. Hursh, Administrative Law Judge

[16] ALJ Order filed May 31, 2012, at 2.